IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 521

DIANA KEARNY POWELL, *Petitioner*

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee; ANNE T. OGDEN and LESTER H. SELLERS, Executors of the Estate of Lucy Powell, deceased; ANNETTE I. POWELL, ADELE POWELL MARBUT, THELMA COX POWELL, ROBERT RANDOLPH POWELL, JR., MARY POWELL DAVIDSON, MARTHA POWELL NISTLER, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on July 31, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is unreported. (Pet. 1a-2a). The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 4a-10a) is unofficially reported at 89 W.L.R. 1323 (Sept. 13, 1961). It has not been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit (Pet. 4a) was entered on July 31, 1961. Motion for rehearing by the Court en banc filed August 11, 1961 was denied by order entered September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does a United States District Court interpreting an unambiguous residuary clause of a will in conflict with its plain meaning and in conflict with pertinent rules of law, act in so arbitrary and capricious a manner as to deprive the remainderman under the will of vested property rights without due process of law in violation of the Fifth Amendment of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. C. Constitution of the United States, Amendment 5:

No person shall be . . . nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

District of Columbia Code, Title 45, § 45-812—Vested and Contingent Future Estates.

A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the arrival of a certain period or event when it is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain. (Mar. 3, 1901, 31 Stat. 1351, ch. 854 § 1022).

STATEMENT OF THE CASE

Lucy Powell, the last of two life beneficiaries and last of five children named remaindermen by testatrix in her will, died September 1, 1958, and no child or descendant of a deceased child of testatrix except the petitioner herein, a granddaughter, was surviving at that date. (R.JA 25). The will provided that upon termination of the life estate by the marriage or death of both daughters (the two life beneficiaries), the entire property was *then* to be divided equally among five children of testatrix named in the will, the descendants of a deceased child to take the share of the parent, and specifically restating her intention that the entire property was to go to her children and their descendants. (R.JA 9-10). A report of the auditor on the third account of the successor trustee, filed March 31, 1959 (R.JA 14-17) showing distribution of one-third of the personal assets of the principal to petitioner and retention of two-thirds pending endeavor to locate Owen Bullitt Powell and George Cuthburt Powell, or their issue, if any, was approved by Order of the District Court, April 15, 1959 (R.JA 17-18). These two missing remaindermen were later found to have died in 1936 and 1943 respectively, neither one leaving surviving issue.

Petitioner Diana Kearny Powell, substituted remainder-men in the rights of her father, William Glasgow Powell, who died May 11, 1955, moved for distribution to her of the entire estate (R.JA 18-25) on August 31, 1959. Over petitioner's objections, motions filed by the Successor Trustee, and by the executors of the will of Lucy Powell who had not been substituted to their decedent or been made parties, were granted adding some twenty persons, including the above-described executors, none of whom were related to testratrix, as parties entitled to share in the estate, the estate of Lucy Powell claiming a major share. Ruling of the District Court (Pet. 1a-3a) and Order pursuant thereto (Pet. 3a-4a) authorized distribution of four-fifths of the estate to these new claimants, citing *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946) as precedent that each of the five children named by testratrix in her will took a vested remainder which could be divested only if the child died prior to the death of the life tenants *with* issue surviving, the remainders of those dying *without* issue going to their respective estates. (Pet. 2a-3a).

A cross-claim for fraud by petitioner against the executors of the estate of Lucy Powell was summarily dismissed on December 21, 1960, on motion of the cross-claim-defendants on the ground that petitioner was without status to make the claim. This proceeding has not been made a part of the record on this appeal except by reference.

Appeal of right was duly taken, October 13, 1960, from the judgment of the District Court of September 20, 1960 (Pet. 1a-3a), and was argued February 20, 1961. Judgment of the District Court was affirmed in a two to one decision entered July 31, 1961 (Pet. 4a-

10a), on the premise that each of the five children of testatrix took a "vested remainder in fee" in one-fifth of the trust estate which passed to their respective estates on their death prior to termination of the preceding particular estate without surviving issue, and subject to be divested only if they predeceased the life tenants and were survived by issue. (Pet. 6a).

The dissenting opinion by Judge Prettyman, who also rendered the decision in *Pyne* v. *Pyne* (*supra*), cited as authority by all parties, cites the Pyne case as supporting petitioner's position that since testratrix clearly stated that her property was to remain with her own descendants, her clear intention should be respected.

Federal District Court had original jurisdiction of this case. The constitutional question was not previously specified, but is implied from the merits of the case and the proceedings.

ARGUMENT

Petitioner has a vested right in the whole residuary estate of her grandmother which is protected by the due process clause of the Fifth Amendment of the Constitution of the United States. That right has been violated by the ruling of the District Court authorizing four-fifths of the estate to be diverted to claimants not having such right, in conflict with well settled rules of law.

Petitioner, only granddaughter and living descendant of her grandmother, claims a vested right in the whole residuary estate of her grandmother under the clause of her grandmother's will set forth verbatim in the opinion of the court below (Pet. 5a).

Petitioner's father, William Glasgow Powell, trustee and remainderman under the will, died May 11,

1955. Lucy Powell, surviving life beneficiary, brought an action for appointment of the National Savings and Trust Company as successor trustee, naming petitioner, Owen Bullitt Powell, and George Cuthbert Powell as defendants. On the death of Lucy Powell, September 1, 1958, under the terms of the will as well as the rules of the Common law, the future estate vested absolutely and in fee in the remaindermen, ascertained and in being on that date. Owen, Cuthbert and Aimee named in the will all predeceased Lucy, and none had surviving issue, so that petitioner was the only remainderman having a vested future interest at termination of the trust. (R.JA 25).

It is well-settled law that there must be a person ascertained and in being for an interest to vest. The vesting of future interests is defined by statute in the District of Columbia, *District of Columbia Code,* Title 45, § 45-812 (Pet. 2). This conforms with the common law prohibition of abeyance of the seisin. Local decisions sustain this view. *Keep* v. *District of Columbia,* 181 F. 2d 789, 86 U.S. App. D.C. 206 (C.A.D.C. 1950) holds that vested remainders are subject to be divested should the remainderman, or any of them, fail to survive the life estate. *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946) holds that the deceased remainderman is divested of his interest in favor of the substituted remainderman, and could not convey by will an interest which he did not have. *Jewell* v. *Graham,* 57 App. D.C. 391, 24 F. 2d 257, cer. den. 49 S. Ct. 559, 277 U.S. 596, 72 L. ed. 1006 holds similarly.

In the case here under consideration, the dissenting opinion cites the basic rule of construction that the intent of the testator controls, an intent plainly stated (Pet. 5a-9a) that the division of the property was to

take effect upon termination of the life estate among the remaindermen *then* in being. This is a gift to a class, not to individuals, and meets all the qualifications for such a grant.

The decision sought to be reviewed and the ruling of the District Court which it affirms, based upon the arguments of counsel for the Successor Trustee and of the Estate of Lucy Powell, claim in effect that an estate in fee was created in each of the five children of testatrix at the time of death of testatrix, or even at the time of drafting the will. Such a construction is self-contradicting and produces a ridiculous result in attempting to circumvent the provision of the District Code (Pet. 2) providing that a future estate is contingent when the person to take is uncertain.

The transcript of the ruling of the District Court and its self-contradiction, in conflict with earlier rulings by the same court on the same facts, and in conflict with established principles of law needs no comment. We submit that it is patently arbitrary and capricious.

The inviolability of vested rights delineated by Chief Justice Marshall in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, are of equal force under the Fifth Amendment as under the contract clause of the Constitution. In a closely parallel case, *Ochoa* v. *Hernandez*, 250 U.S. 139, at 161, 57 L. ed. 1427, 33 S. Ct. 1033, this court ruled:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist in the sense in which it is known to our laws. The principal, known to the common law before Magna Charta, was embodied in that charta (Coke 2, Inst. 45, 50), and has been recognized since the Revolu-

tion as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure."

CONCLUSION

It is submitted that the important constitutional question of vested rights and the danger of a capricious decision becoming a precedent warrants review by this Court.

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APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4051-55

POWELL

v.

POWELL, ET AL.

September 20, 1960

Washington, D. C.

The above-entitled matter came on for hearing on motion before The HONORABLE ALEXANDER HOLTZOFF, a United States District Judge, at 1:50 P. M.

Ruling

The Court (J. Holtzoff): The Court is of the opinion that each of the four children named in the fourth paragraph of the will took a vested remainder subject to being divested in the event that the child died prior to the death of the life tenants without issue.

And the Court will order distribution on that basis. While it is often said that no will has a twin brother nevertheless the case of Pyne versus Pyne, 81 Appeals D. C. 11, supports the construction hereby adopted by this Court.

You may submit your order.

Mr. Dulany: I only wanted to clarify whether Your Honor's ruling—I did not hear it correctly. What I want to know if I did hear it correctly. Did Your Honor say it would be divested if the child died with issue or without issue?

The Court: The child died with issue.

Mr. Dulany: With issue.

The Court: I intended to say with issue.

Mr. Dulany: I thought you said without issue and then referred to the Pyne case and I was not sure.

The Court: I am following the construction of the Pyne case.

Miss Powell: Your Honor, does that mean that if they died with or without issue?

The Court: Subject to being divested if they died with issue. Now the fact is that four of them died without issue and, therefore, their remainders are vested and not divested. And, of course, their remainders will descend either to their heirs or next of kin or devisees or the legatees as the case might be.

I notice there are other matters on the Court's list in this case. Objection to the fourth report of the auditor and a motion to strike under Rule 11. What are they?

Miss Powell: Your Honor, I believe that the other issues were in effect settled by your decision in the matter. I frankly must say that I am very—I am quite appalled that there has not been a very careful study as I asked.

The Court: Well now there is a motion under Rule 11 to strike the opposition of successor trustee and objections to the report of the successor trustee.

Now, of course, I am not going to strike any opposition. But, I will deny the motion under Rule 11 filed May 10, 1960.

Final Order Granting Motion of National Savings and Trust Company for Summary Judgment and Denying Other Motions

This cause having come on to be heard on the motion of the National Savings and Trust Company, Successor Trustee, for summary judgment, requesting the instructions of the Court with respect to the proper distribution of the trust estate created under the will of Diana Kearny Powell, deceased, and on the motion of defendant Diana Kearny Powell for summary judgment, and upon consideration of the pleadings, exhibits and memoranda of points

and authorities filed herein and of the arguments of counsel in open Court, and it appearing that there is no genuine issue as to any material fact herein, and it being the opinion of the Court that each of the five remaindermen designated in said will, namely, William Glasgow Powell, Owen Bullett Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell, received a vested remainder in one-fifth of said estate subject to being divested only by his or her death leaving descendants surviving prior to the time of distribution set forth in said will, and accordingly that as to each of said remaindermen who died prior to the time of distribution leaving no surviving descendants his or her remainder interest was not divested and now is distributable to his or her successors in interest, therefore, it is by the Court this 5th day of October, 1960.

ORDERED, as follows:

1. That the motion of the National Savings and Trust Company, Successor Trustee, for summary judgment be, and the same hereby is granted.

2. That the motion of defendant Diana Kearny Powell for summary judgment be, and the same hereby is denied.

3. That the National Savings and Trust Company, Successor Trustee, shall file its final account herein, showing distribution of said trust estate, after payment of its commissions and costs and a reasonable fee to its attorneys herein to be approved by the Court, of one-fifth thereof to Diana Kearny Powell, surviving daughter of William Glasgow Powell, and one-fifth thereof to the successors in interest of each of the following, viz: Owen Bullett Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell.

4. That, for the purpose of making said distribution as aforesaid, said National Savings and Trust Company, Successor Trustee, be and it hereby is authorized and directed to sell all the assets of said trust estate, both real and personal, and convert the same into cash.

AND IT IS FURTHER ORDERED that the motion and objections of defendant Diana Kearny Powell to the fourth report of the auditor, and the motion of said defendant to strike under rule 11 be, and the same hereby are denied.

ALEXANDER HOLTZOFF
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16071

DIANA KEARNY POWELL, *Appellant*

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee, et al., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Opinion

Decided July 31, 1961

Miss Diana Kearny Powell, appellant *pro se*.

Mr. Henry H. Paige, with whom *Messrs. Arthur P. Drury*, *John M. Lynham*, and *John E. Powell* were on the brief, for appellee, National Savings and Trust Company, Successor Trustee.

Mr. Benj. W. Dulany for appellees Anne T. Ogden and Lester H. Sellers, Ancillary Executors of the Estate of Lucy Powell, deceased.

Mr. Nathan Wold entered an appearance for appellee Martha Powell Nistler and certain other appellees.

Before: WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.

In 1958 the last surviving of five life tenants of the trust estate died and the appellee trustee was required to make final distribution under a residuary trust provision contained in a will executed in 1895. Under the terms of the trust one-half of the trust income was given to each of two daughters of testatrix for life or until marriage,

> and upon the marriage or death of both daughters then *fourthly & finally* to divide the said property *absolutely and in fee*, . . . equally between my children *now* living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children *as hereinbefore specified*. (Emphasis added.)

Four of the five children of the testatrix died, without issue surviving, prior to the time of distribution. Appellant is the sole surviving child of William G. Powell, the last survivor of testatrix' five children.

The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the

testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

We hold that the will discloses an intent to vest each of the five children with an equal share of the residue "absolutely and in fee," subject only to the life estates of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

In *Pyne* v. *Pyne*, 81 U.S. App. D.C. 11, 154 F. 2d 297 (1946), we held that unless both conditions, death of the remainderman during the preceding life estate and survival of issue of the deceased remainderman are met, the remainderman has a vested interest which passes by his will or by statute as the case may be. See also *Scott* v. *Powell*, 86 U.S. App. D.C. 277, 182 F. 2d 75 (1950); *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*, 107 U.S. App. D.C. 375, 278 F. 2d 255 (1960).

It is suggested by the dissent that this view ignores the testatrix' express intention which is articulated following the vesting clause "to divide the said property *absolutely and in fee*, . . . equally among my children *now living* . . . ." We hold simply that it would take strong and unequivocal language to negate the use of these classic words of art which have accepted meaning and fixed legal consequences. Read as Judge Prettyman reads it, the second part of the sentence is not an explanation but a repudiation of the vesting clause. It should be noted that the explanation or expression of intent which follows the vesting clause, is in turn qualified by the phrase "as hereinbefore specified" which completes the circle and takes us back to the vesting language "absolutely and in fee."

It is no help in the process of searching for intent to look to unanticipated events to prove that the testatrix could not have meant what she said by the words "absolutely and in fee." Of course she had no way of knowing in 1895 that four of her five children would die without issue. But we cannot predicate our construction of the will on what happened over the 63 years intervening between the date of the will and death of the last of five vested remaindermen. Nor can we give such weight as is urged to the "blood line" argument, for if each of her children had been survived by one child those children could have freely distributed this property outside the blood line. That events did not develop as the testatrix probably thought they would does not give us freedom to construe her will now as we think she ought to have written it had she been able to peer 63 years into the future.

Affirmed.

PRETTYMAN, *Circuit Judge*, dissenting: The basic rule of the law of wills, as I understand it, is that the intention of the testator, if it can be ascertained from language in the will, governs. This means what he intended as a matter of practical reality in his own mind, in so far as his words indicate his purpose. That question is devoid of consideration of legalisms and the niceties of judicial semantic ascription.

In the case at bar the testatrix clearly stated her intention that her property was to remain in her own family, with her own descendants. In the last part of the long sentence from which the court quotes in its opinion, she wrote:

> "• • • it being my intention that [if both daughters died or married] the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified."

The purport of that emphasis upon her intention seems to me indisputable. She had in mind, and attempted to

make clear, that at the time when the division was appointed to take place, *i.e.*, when the property was rid of its incumbent trust, her property should go to her own children and their descendants, and to no one else. Since that intention is clear, that ends the matter. The property must go as intended.

The court construes the early part of the provision it quotes. It correctly applies the rules of construction. In so far as that part of the provision is concerned, and in so far as legal rules of construction are concerned, the court, I agree, is correct. The error, it seems to me, is that the court ignores the plain expression of intent in the latter part of the quoted provision. It concludes upon construction that the property should be divided into five parts and then subdivided among the legatees, assignees, or heirs at law of each of the original children. Since four of those children had no descendants, this construction means that four of the five parts go to collaterals, in-laws, or strangers; the only direct descendant of the testatrix or of any of her children gets only one-fifth. This, to my mind, is a far cry from the clear intention of the testatrix, as expressed in the simple and emphatic restatement of her intent quoted above.

This preference of a testator to keep his property in those of his own blood is a usual one. As the Court of Appeals of New York once remarked: "Of two doubtful interpretations, that favoring the blood of the testator rather than strangers will be adopted. Human nature usually so acts."[1]

The legal point I make is that a court does not apply to the language of a will rules designed to give meaning to meaningless expressions, if the court can ascertain from the will the actual intention of the testator, *i.e.*, what the testator really meant to do with his property. Only if

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[1] *In re* Rooker's Will, 248 N.Y. 361, 162 N.E. 283 (1928).

the actual intention of the testator cannot be ascertained from the four corners of the will does the law undertake to assign an artificial meaning and result to the words used. Lacking knowledge of actual intent, the courts ascribe by an abstruse system of legalisms a meaning to the will and thus, by a naked fiction, an intention to the testator.

In the learned authorities, such as the *Restatement*,[2] the phrase "judicially ascertained intent" is used, but that term means, first, what the testator had in mind, judicially ascertained from the language of the instrument. If his actual intent is clearly to be found in the will, the court so finds, and this is the judicially ascertained intent. The *Restatement* says, for example, "The dominant objective of construing a conveyance is to determine the disposition which the conveyor wanted to make."[3] The use of the phrase "judicially ascertained intent" to include a plain purpose indubitably expressed in simple words seems to me to create confusion. But the real meaning of the authorities nevertheless seems to me to be clear.

The cases cited by the court, *Pyne* v. *Pyne*,[4] *Scott* v. *Powell*,[5] and *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*,[6] do not suggest a different view. In *Pyne* v. *Pyne* we carefully pointed out:

> "The basic, always controlling, rule in the construction of wills is the intent of the testator. If that intent can be discerned in the language of the will, read, of course, in the light of the surrounding circumstances, there is an end to the matter."[7]

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[2] 3 PROPERTY § 241 (1940).

[3] *Id.*, Comment *c*.

[4] 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946).

[5] 86 U.S. App. D.C. 277, 182 F. 2d 75 (D.C. Cir. 1950).

[6] 107 U.S. App. D.C. 375, 278 F. 2d 255 (D.C. Cir. 1960).

[7] 81 U.S. App. D.C. at 14, 154 F. 2d at 300.

We searched that will for "indicia of intent" and then went on to say: "If these indicia of intent within the will be not conclusive, we must ascertain the meaning which the law attaches to the provision in controversy."[8] We found that the available "indicia of intent" and the law's construction of the terms were the same. In *Scott* v. *Powell* we meticulously searched the whole will and considered its "scheme", and thus ascertained an "evident intent that the property should go to the testatrix's descendants so long as there were any."[9] In *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*, the problem which arose sixty-three years after the will had been written was obviously not contemplated by the testatrix, and so we laboriously applied the law's rules of construction. All three of those cases were correctly decided, in my judgment. None of them applies to the case at bar. In this latter the actual intent of the testatrix is clear, and we should not belabor the matter. Her intention is all there is to the case.

I would reverse.

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[8] 81 U.S. App. D.C. at 15, 154 F. 2d at 301.

[9] 86 U.S. App. D.C. at 283, 182 F. 2d at 81.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays for rehearing under Rule 58(2) of this Court of the Order entered December 18, 1961, denying Petitioner's prayer that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on July 31, 1961.

INTERVENING CIRCUMSTANCES AND GROUNDS NOT PREVIOUSLY PRESENTED

Motion for Summary Judgment in this cause was filed December 21, 1961, in the United States District Court for the District of Columbia by Emilia L. Powell, a party-defendant (Rec. 25, 32, 33) on grounds that under the ruling of the Court of Appeals the residuary estate of testatrix Diana Kearny Powell vested in fee at the time of her death, that a condition subsequent divesting the fee is repugnant to the nature of the estate granted, and that therefore the entire residuary estate vested absolutely in fee in William Glasgow Powell alone under the clauses of the will set forth below, vesting on his death in this movant as his widow and sole beneficiary of his will.

The Third and Fourth clauses of the will (Rec. 9) provide:

> ". . . I give and devise the above described property in Cape May, New Jersey, and in St. Louis, Missouri, unto my son William Glasgow Powell, and his heirs forever, . . ."

and,

> "*Fourth*: All the rest and residue of my estate, real, personal and mixed, of whatsoever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized and possessed, I give, devise and bequeath unto my said son William Glasgow Powell, and his heirs forever, . . ."

If the above-cited clauses of the will are not construed as vesting the bare legal title to stay the fee

until termination of the trust by the death of the life beneficiary, then they must be construed literally as vesting the fee in William Glasgow Powell alone to the exclusion of all remaindermen as well as the life beneficiaries, *ab initio*.

Motion for Summary Judgment in this cause was filed January 6, 1962, in the United States District Court for the District of Columbia by Elizabeth Powell Adams, a party-defendant (Rec. 32, 33) on grounds that the entire corpus of the estate of testatrix Diana Kearny Powell vested in this movant in fee. Under the rulings of the United States District Court (Pet 2a) and the United States Court of Appeals for the District of Columbia Circuit (Pet. 6a) that each of the five children of testatrix took a fee interest at the death of testatrix, subject to being divested by their death with issue surviving, she is entitled as next-of-kin through her father, a half brother of the five children of testatrix (Rec. 32, 33) to the vested fee which descended to her on the death of each. The share of William Glasgow Powell, who died with surviving issue, thereby was divested of his interest, which could not pass through him to his issue, and so reverted to the estate and to this movant in fee.

WHEREFORE, Petitioner respectfully submits that these Motions are substantial intervening circumstances showing that the decisions of the Courts below deprive petitioner of rights clearly vested in her alone under the unambiguous terms of her grandmother's will (Pet. 5a) in violation of Amendment Five of the Constitution of the United States and in conflict with the decision of this Court in *Ochoa* v. *Hernandez*, 250 U.S. 139, 161, 57 L. ed. 1427, 33 S. Ct. 1033, war-

ranting reconsideration of the Petition and review by this Court.

DIANA KEARNY POWELL.
1500 Massachusetts Ave., N. W.
Washington 5, D. C.
Attorney, Petitioner pro se

Certificate of Good Faith

I, Diana Kearny Powell, the Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing of Petition for Writ of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial effect, or which to the extent that they were available to petitioner, were not previously presented.

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